

(2019) 03 CAT CK 0018

In the Central Administrative Tribunal

Case No : Original Application No. 549 Of 2016

Jai Bhagwan Singh S/o Gulab Singh Vs Union Of India Through ?

Date of Decision : 01-03-2019

Acts Referred:

Citation : (2019) 03 CAT CK 0018

Hon'ble Judges : L. Narasimh Reddy, J; Mohd. Jamshed, J

Bench : Division Bench

Advocate : Harvinder Oberoi, Hanu Bhaskar, R. V. Sinha

Judgement

L. Narasimha Reddy, J

1. The applicant is working as Inspector in CBI. He became due for promotion to the post of Deputy Superintendent of Police (DSP). The DPC was convened on 14.12.2010 to consider the candidates for the vacancies referable to the year 2009 and 2010. The applicant was not in the zone of consideration for the two vacancies available for the year 2009. There were as many as 101 vacancies for the year 2010. He was considered for that, but was declared unfit.

2. The applicant filed OA No.1731/2012 before this Tribunal with a prayer to direct the respondents to ignore the minutes of the DPC in his case, and to convene a review DPC. His contention was that, for the vacancies of the year 2010, the ACRs for five years earlier to 2009 were relevant, and had that been done, the ACR of the year 2004, which is below benchmark, would not have become relevant. It was also pleaded that the ACR for the year 2006 was downgraded by the DPC without basis. The OA was disposed of on 04.09.2015, leaving it open to the applicant to make a comprehensive representation, and directing the respondents to pass a reasoned order.

3. A representation was made accordingly. The competent authority in the CBI passed order dated 01.01.2016 informing the applicant that the ACRs for five years, earlier to and inclusive of the year 2008, became relevant, and accordingly, the ACR for the year 2004 was taken into account. It was also stated that as against the requirement of four, out of

five, ACRs to be up to the benchmark, i.e., 'Good?', the applicant had only three, inasmuch as the ACR for the year 2006 was downgraded by the DPC. Other reasons were also mentioned. This OA is filed challenging the order dated 01.01.2016.

4. The applicant contends that his ACR for the year 2009 was required to be taken into account, and had that been done, the below benchmark ACR of the year 2004 would have become irrelevant. He further contends that the ACR of the year 2006 was downgraded by the DPC without any basis, and without recording any reasons. He submits that the DPC declared fit for promotion, some of the officers, whose ACRs were also not up to the mark, and that discriminatory treatment was accorded to him. He submits that the office memorandum dated 05.06.2008, which empowered the DPC to downgrade the ACR of an employee by one stage, whenever any punishment was imposed, was found to be contrary to the law by the government itself through office memorandum dated 28.04.2014, and the ACR of the year 2008 was required to be taken as it was. He contends that the respondents were under an obligation to convene review DPC for him.

5. The respondents 1 and 2, on the one hand, and the respondent No.3, on the other, filed separate counter affidavits. According to them, the applicant has only three ACRs which are up to the mark, out of five, as against the requirement of four. It is also pleaded that the main contention of the applicant against the downgradation of the ACR of the year 2006 was that the punishment was not implemented, and that the same hardly constitutes any basis. It is also stated that the DPC has the discretion to have its own assessment of the ACRs, and that the case of the applicant was considered strictly in accordance with law.

6. We heard Ms. Harvinder Oberoi, learned counsel for the applicant, and Shri Hanu Bhaskar and Shri R. V. Sinha, learned counsel for the respondents.

7. The case of the applicant for promotion to the post of DSP was considered against the vacancies of the year 2010. DPC for this purpose was held on 14.12.2010. The ACRs of the applicant for the years 2004 to 2008 were taken into account. The benchmark adopted by the DPC was 'Good?'. Except the ACR of the applicant for the year 2004, rest were assessed as 'Good?'. However, the ACR of the year 2006 was downgraded to 'Average?' by the DPC on the ground that the applicant was imposed punishment of stoppage of one increment without cumulative effect, during that period. Since only three ACRs were found to be above benchmark, the applicant was declared unfit.

8. The applicant contends that in view of the fact that the vacancies of the year 2010 were being considered, and the DPC was held in December, 2010, the ACRs of the year 2009 and four years earlier to that were required to be taken into account. He is of the view that had that been done, the ACR of the year 2004 would have become irrelevant, and even if the ACR of the year 2006 stood downgraded, the result in respect of the applicant would have been different.

However, the contention of the applicant is difficult to be accepted. The reason is that the ACRs of an employee for a period of five years need to be taken into account, with a gap of one year between the year of consideration and the latest of the ACR. The reason is that the ACR of the immediately preceding year of the vacancy may not be available. Therefore, instructions have been issued by the Government in such a way that ACRs of one year immediately preceding the convening of DPC are excluded from consideration. If this is done, the ACR of the applicant for the year 2009 does not become relevant.

9. The second contention of the applicant is that the DPC ought not to have downgraded his ACR for the year 2006. Though one of the reasons pleaded by him is that the punishment was not implemented at all, we are not inclined to accept that.

10. It is true that the Government issued office memorandum dated 05.06.2008 empowering the DPC to downgrade the ACR of an employee under consideration to promotion by one stage, if it notices that the employee was imposed major or minor penalty in any particular year relevant for that purpose. The memorandum required the DPC to record reasons, whenever it takes such a step. In the instant case, no such reasons were recorded. On the other hand, the tenor of the pleadings delivered on behalf of the UPSC is that full particulars on this aspect were not placed before the DPC.

11. Be that as it may, the Government issued a detailed and comprehensive set of instructions on 28.04.2014. The gist of various judgments of the Hon^{ble} Supreme Court in relation to the powers of the DPC and the procedure to be adopted by it, and the purport of the office memoranda dealing with the subject as on date, were taken into account. In para 7, the guidelines which are framed afresh were enlisted. Sub para (h) thereof reads as under:

"h) Any proposal for promotion has to be assessed by the DPC, on case to case basis, and the practice of downgradation of APARs (earlier ACRs) by one level in all cases for one time, where a penalty has been imposed in a year included in the assessment matrix or till the date of DPC should be discontinued immediately, being legally non-sustainable."

This fell for consideration before this Tribunal in OA No.2282/2014. It was observed that since the OM itself mentioned that the practice was illegal and unsustainable, the relevant OM in this behalf must be treated as non est, and a direction was issued in that OA to re-consider the case of the applicant therein for promotion, without lowering the grading of his ACR for a particular year. Same situation obtains in this case also.

12. An ACR is prepared with the participation of three authorities. The reporting authority, which is the immediate authority of the employee under consideration, would have the benefit of observing the performance of the employee. The assessment made by the reporting authority is evaluated by the reviewing authority. He is accorded the liberty to make his own assessment of the

employee. It is ultimately the accepting authority which pronounces the last word on the issue. They would be aware of the strengths and weaknesses of the employee. Their evaluation does carry some weight.

13. A DPC can make its own assessment of an employee under consideration for promotion de hors the gradation in the ACRs. However, conferring power upon it to straightway downgrade an ACR, which is the result of the combined exercise of power by three authorities, was found by the Government itself, to be not in conformity with law. For example, if a small lapse on the part of an employee has led to imposition of a minor penalty, but his performance on other parameters, was to the satisfaction of the authorities, who in turn made an overall assessment in terms of the ACR, the DPC cannot wipe away the same on mechanical grounds. This Tribunal in OA No.2284/2014 observed as under:

"One of the argument put forth on behalf of respondents is that the OM dated 28.4.2014 will have prospective application only. Had the OM suggested any new procedure, the argument put forth by the learned counsel could be acceptable. But it is not so, as in terms of the OM, the DoP&T has declared the procedure of down grading the grading in ACR by one level as legally not sustainable. In other words, the OM has not provided any new procedure to be followed prospectively but has declared the procedure lay down in terms of the aforementioned note as illegal. Once a procedure has been declared illegal, the ramification would be that the same is non-existent...."

Reliance was placed upon the judgment of the Hon^{ble} Supreme Court in Shyam Sunder and others v Ram Kumar and another [(2001) 8 SCC 24], wherein it was held that a provision of statute, declaratory or of procedure, should always be treated as retroactive in its operation, unless a different view is expressed in the statute itself. We are in full agreement with the view expressed by the Bench which decided OA No.2284/2014.

14. Learned counsel for respondent No.3 placed

reliance upon the judgments of the Hon^{ble} Supreme Court in -

(1) Union Public Service Commission v M. Satyha Priya and others [(2018) 15 SCC 796];

(2) Union of India v A. K. Narula [(2007) 11 SCC 10];

(3) Union of India v S. K. Goel & others [(2007) 14 SCC 641];

(4) Union Public Service Commission v Hiranyalal Dev & others [(1988) 2 SCC 242]; and

(5) Union of India v K. V. Jankiraman & others [(1991) 4 SCC 109].

All of the above are in relation to the extent of judicial review and the primacy accorded to the views expressed by the DPC. There is absolutely no second opinion about the propositions laid down therein. The whole controversy is about

the steps taken by the DPC in the context of downgrading an ACR, which the Government itself declared as "legally not sustainable". The applicant cannot be made to suffer on account of the result of such a legally unsustainable exercise.

15. We, therefore, allow the OA, and direct the respondents to convene a review DPC to consider the case of the applicant for promotion to the post of DSP against the vacancies of the year 2010, without downgrading his ACR for the year 2006. This exercise shall be completed within a period of two months from the receipt of this order. There shall be no order as to costs.